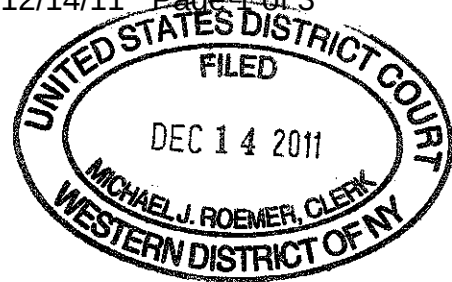


UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

---



MELVIN LAVON VIRGIL,

Plaintiff,

v.

REPORT & RECOMMENDATION  
and DECISION & ORDER

10-CV-6479CJS

ERIE COUNTY MEDICAL CENTER, et al.,

Defendants.

---

On May 31, 2011, plaintiff Melvin Virgil ("Virgil") in the above-captioned matter moved to amend his complaint. (Docket # 20). In response, defendant Jennifer Darlak ("Darlak") and defendant Erie County Medical Center ("ECMC") and the John and Joe Doe defendants cross-moved for judgment on the pleadings. (Docket ## 25, 26). In response, Virgil submitted a revised proposed amended complaint. (Docket # 33). The district court referred the motions to the undersigned to issue a report and recommendation. (Docket # 28). This Court held oral argument on those motions on October 20, 2011. (Docket # 43). Thereafter, Virgil filed a second motion to amend his complaint. (Docket # 40). ECMC again cross-moved for judgment on the pleadings. (Docket # 47). This Court held oral argument on those motions on December 14, 2011, and issued an oral report and recommendation.

Accordingly, for the reasons stated on the record on December 14, 2011, I recommend that Virgil's motions to amend his complaint (Docket ## 20, 40) be granted in part and denied in part. Specifically, I recommend that Virgil be permitted to amend his complaint to assert claims against Jennifer Darlak and Amy Keith under 42 U.S.C. § 1983 for deliberate indifference to serious medical needs. In addition, I recommend that Virgil be permitted to

amend his complaint to assert state negligence claims against Darlak, and claims for negligent training and *respondent superior* against “John Doe Corporation” as Darlak’s employer. Virgil’s request to withdraw his proposed state claims for negligence against Amy Keith is granted. In addition, Virgil’s request to withdraw his proposed claim for breach of contract against ECMC without prejudice to renewal following discovery is granted. I further recommend that Darlak’s motion for judgment on the pleadings (Docket # 25) be denied. Finally, I recommend that ECMC’s motions for judgment on the pleadings (Docket ## 26, 47) be granted in part and denied in part.



---

MARIAN W. PAYSON  
United States Magistrate Judge

Dated: Rochester, New York  
December 15<sup>th</sup>, 2011

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby

**ORDERED**, that this Report and Recommendation be filed with the Clerk of the Court.

**ANY OBJECTIONS** to this Report and Recommendation must be filed with the Clerk of this Court within fourteen (14) days after receipt of a copy of this Report and Recommendation in accordance with the above statute, Fed. R. Civ. P. 72(b), 6(a) and 6(e) and Local Rule 72.3(a)(3).

The district court will ordinarily refuse to consider on *de novo* review arguments, case law and/or evidentiary material which could have been, but was not, presented to the magistrate judge in the first instance. *See e.g. Paterson-Leitch Co., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985 (1st Cir. 1988).

**Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order.** *Thomas v. Arn*, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Ltd.*, 838 F.2d 55 (2d Cir. 1988).

The parties are reminded that, pursuant to Rule 72.3(a)(3) of the Local Rules for the Western District of New York, "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 72.3(a)(3), or with the similar provisions of Rule 72.3(a)(2) (concerning objections to a Magistrate Judge's Decision and Order), may result in the District Court's refusal to consider the objection.**

Let the Clerk send a copy of this Order and a copy of the Report and Recommendation to the attorneys for the Plaintiff and the Defendant.

**IT IS SO ORDERED.**

*Marian W Payson*

MARIAN W. PAYSON  
United States Magistrate Judge

Dated: Rochester, New York  
December ~~13~~<sup>14</sup>, 2011